

# Standards to Identify and Decide the Legality of State Aviation Behaviors Performed in the South China Sea Region

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**Abstract:** The South China Sea (SCS) airspace is a part of the important base supporting China's management and development of Dongsha, Zhongsha, Xisha and Nansha Islands as well as their adjacent waters. China's entitlement to the SCS airspace should include, all the existing and future rights necessary for the development of these SCS islands, and for the maintenance of the sovereign relations between China's mainland territory and its indispensable archipelagic waters. The freedom of navigation and overflight of other States should be without prejudice to China's exercise of such rights. Currently, the two concepts, "aircraft" and "aviation behaviors", are confused and used interchangeably both in the academic and practitioner circles. In addition, studies on the notion of state aviation behavior are few. Therefore, there is no clear standard to identify state aviation behaviors or state aviation behaviors performed in foreign or international airspace. This paper, by collating and examining the existing concepts and definitions, clarifies the differences between "aircraft" and "aviation behavior." Further, it defines the notion of state aviation behavior after reviewing the purpose and behavioral attributes of state aircraft. Lastly, the author sorts out the standards which can be applied to decide the legality of state aviation behaviors performed in foreign and international airspace.

**Key Words:** Civil aviation behavior; State aviation behavior; International law; Conventions on civil aviation

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## I. Research Questions

Serving as a strategic passage and energy base, the South China Sea (SCS) holds special strategic significance to China, a hybrid country that borders with both land and sea.<sup>1</sup> Particularly, the current views and opinions about the U-shaped line in the SCS are not consistent. There are mainly four different postulations regarding the legal status of this line, namely, the “historic waters line”, the “historic title line”, “maritime boundary line”, and the “islands ownership line”. In accordance with the postulation of “islands ownership line”, China has indisputable sovereignty over the Dongsha, Zhongsha, Xisha and Nansha Islands as well as their surrounding waters.<sup>2</sup> It implies that the SCS islands form an indispensable part of China, and the operation of state aircraft, especially those of foreign States, would become the focus of worldwide attention.

On the one hand, according to Article 3 of the Convention on International Civil Aviation (hereinafter “Chicago Convention”), “[n]o state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.” On the other hand, China has concluded many bilateral aeronautical agreements with other States, allowing the entry of their civil aircrafts to China’s airspace.

Recently, under the pretext of the so-called “freedom of navigation”, many attempts have been made to internationalize the SCS issue. However, “freedom of navigation” and “freedom of overflight”, primarily, refer to the rights on the high seas. In contrast, the U-shaped line is an islands ownership line and resource

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1 Du Debin, Fan Fei and Ma Yahua, Territorial Disputes in the South China Sea and China’s Strategies, *World Regional Studies*, Vol. 21, No. 2, 2012, p. 1. (in Chinese)

2 Li Jinming, The Legal Status of the U-shaped Line in the South China Sea: Historic Waters, Maritime Boundary or a Line of Islands Ownership?, *Southeast Asian Affairs*, No. 4, 2010, pp. 22~29 (in Chinese); Li Jinming, Background and Legal Status of the U-shaped Line in the South China Sea, *Contemporary International Relations*, No. 9, 2012, pp. 7~14 (in Chinese). Gao Zhiguo, the Director of China Institute for Marine Affairs, SOA, argues that the U-shaped line on the Chinese map is merely a line that delineates ownership of islands rather than a maritime boundary in the conventional sense. He wrote in an article, “[a] careful study of Chinese documents reveals that China never has claimed the entire water column of the South China Sea, but only the islands and their surrounding waters within the line.”

jurisdiction line.<sup>3</sup> China has special entitlement to the waters enclosed by the U-shaped line. Therefore, it is necessary to embark on a discussion on aviation behaviors.

The connotations and denotations of conventional legal concepts, unavoidably, will change accordingly with the development of science and technology, especially those relating to aviation activities. In this case, a study on the basic concepts pertinent to aviation activities is particularly important.

First, both the Civil Aviation Law of the People's Republic of China and the relevant international conventions, confuse the two concepts of "aircraft" and "aviation behavior" and use them interchangeably. For example, Chicago Convention, Article 3, entitled "Civil and state aircraft", defines state aircraft as "aircraft used in military, customs and police services".<sup>4</sup> The expression "aircraft used in military, customs and police services", virtually, is employed to describe "aviation behavior", which however is conceptualized by using the word "aircraft". This is a misuse of "behavior" for "object". For this reason, when civil aircraft carry out state missions, or state aircraft perform civil tasks, misjudgment often occurs in practice. For instance, the Federal Aviation Administration (FAA) says shooting down a drone is a federal crime<sup>5</sup> based on Title 18, Section 32 of the United States Code.<sup>6</sup> This act, obviously, mixes up "object" with "behavior".

Second, although much attention has been given to the study of civil aviation behavior by scholars and practitioners, few in-depth discussions have been made with respect to the definition of state aviation behavior and the criteria to identify state aviation behaviors. Lack of such discussions will result in unclear or vague concepts. The elucidation of state aviation behavior, a concept most linked to civil aviation behavior, would make the scope of the latter clearer, and also contribute significantly to the development of the basic concept system concerning aviation

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3 Jin Yongming, The Nature of China's U-shaped Line in the South China Sea and the Legal Status of Waters Enclosed by the Line, *China Legal Science*, No. 6, 2012, pp. 36-48. (in Chinese)

4 Article 5 of the Civil Aviation Law of the People's Republic of China also adopts the same expression, namely, "Civil aircraft mentioned in this law refer to aircraft other than those used for flying mission of military, customs and police operations."

5 FAA Says Shooting Down Drones Is a Federal Crime, at <http://www.engadget.com/2016/04/18/faa-says-shooting-down-drones-is-a-federal-crime/>, 22 November 2016.

6 18 USC 32: (a) Whoever willfully - (1) sets fire to, damages, destroys, disables, or wrecks any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce; ... shall be fined under this title or imprisoned not more than twenty years or both. Obviously, this provision used the word "aircraft", without distinguishing aviation behaviors.

activities.

Finally, the majority of the recorded eight incidents, where civil aircraft were suspected to be shot down by armed forces, are tragedies caused by misjudging civil aviation behaviors as state ones. These tragedies, in nature, are resulted from the confusing of civil with state aviation behaviors. When a State's aircraft, which have characteristics of state aviation behavior, enter into the airspace of another State, the right of self-defence may be triggered. That is one important reason why state aviation behavior urgently needs a careful study.

Embarking on the nature of aircraft and aviation activities, the author attempts, through examining the existing definitions for "act of aggression", to outline the purpose and behavioral attributes of state aircraft, and further to define state aviation behavior.

## **II. The Legal Status of the SCS Airspace: A Perspective from Maritime Rights and Interests**

Indisputably, the determination of the nature of airspace is fairly important for civil aviation activities. The International Civil Aviation Organization (ICAO) classified airspace into seven classes: Class A, Class B, Class C, Class D, Class E, Class F and Class G.<sup>7</sup> Nonetheless, such technical classification of airspace is preconditioned on the principal attributes of airspace. In this connection, the legal status of the SCS airspace should be decided after first taking into account the

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7 1) Class A: IFR flights only are permitted, all flights are separated from each other and provided with air traffic control (ATC) service; continuous two-way radio communication is mandatory, and all flights are required to follow ATC clearances. 2) Class B: IFR and VFR flights are permitted; other requirements are identical with those of Class A. 3) Class C: IFR flights are separated from other IFR flights; VFR flights are separated from IFR flights; all these flights are provided with ATC service, and other requirements are identical with those of Class B. 4) Class D: IFR flights are separated from other IFR flights and are provided with ATC service; VFR flights receive traffic information in respect of all other flights; and other requirements are identical with those of Class C. 5) Class E: continuous two-way radio communication is mandatory for IFR flights; VFR flights are not required to follow ATC clearances; and other requirements are identical with those of Class D. 6) Class F: IFR flights receive air traffic advisory and information service and VFR flights receive flight information service; all flights are not required to follow ATC clearances; and other requirements are identical with those of Class E. 7) Class G: flights are not required to be separated from each other, and all flights are provided with flight information service; continuous two-way radio communication is mandatory for IFR flights; flights are not required to follow ATC clearances; and other requirements are identical with those of Class F.

status of SCS islands and their adjacent waters.

*A. The Legal Status of the Area Enclosed by  
the U-shaped Line in the SCS*

The Xisha Islands constitutes an integral part of China's territory. And the Chinese government announced the baseline of the territorial sea of Xisha Islands in 1996, and the waters extending up to 12 nautical miles from the straight baseline is the territorial sea of China. Then there comes the question: How to define other parts of the area enclosed by the U-shaped line? Part IV of the United Nations Convention on the Law of the Sea 1982 (UNCLOS) established a unique "archipelagic regime", however, it failed to provide explicitly whether this regime is applicable to non-archipelagic State.

In light of the relevant legal documents and practice, the author is of the opinion: First, China has indisputable sovereignty over the Dongsha, Zhongsha, Xisha and Nansha Islands, as well as their adjacent waters.

Second, the archipelagic regime cannot be applied to the SCS area where China has special entitlement. The UNCLOS failed to deal with the issues associated with the mid-ocean archipelagos of non-archipelagic States, which is an unfortunate omission of the convention.<sup>8</sup> Chinese territory is mainly made of its mainland, which is essentially distinct from the general archipelagic States under Part IV of UNCLOS, which defines archipelagic State as "a State constituted wholly by one or more archipelagos and may include other islands". More importantly, China is a country which carries out public administration and promotes economic and cultural development primarily on its mainland. Its demands for land territory are closely related to the territory of its islands, which is consistent with the country's overall interests and would facilitate public administration. Such demands turn the SCS into an "area where China should have special entitlement". Therefore, the part of the area enclosed by the U-shaped line without fixed baseline of territorial sea, should be the area where China should have special entitlement, in view of the sovereign relations between China's mainland territory and its indispensable archipelagic waters.

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8 Kuen-chen Fu and Zheng Fan, Unity of Archipelago and Freedom of Navigation: Some Suggestions on Applying Archipelagic Regime in the South China Sea, *Journal of SJTU (Philosophy and Social Sciences)*, Vol. 23, No. 6, 2015, pp. 5~13. (in Chinese)

Third, the SCS area where China should have special entitlement is an indispensable zone for China to sustain the healthy development of its SCS islands. As a country which carries out social and economic activities primarily on its mainland, China also needs to effectively manage its islands. This is another aspect that differentiates China from archipelagic States conducting such activities principally on archipelagoes. Compared to its mainland, China's islands in the SCS are still in the primary stage of development, which should be closely connected to its mainland. If China's islands in the SCS are compared to an "infant", then the area enclosed by the U-shaped line can be recognized as a "cradle" nurturing the infant. Therefore, being different from its entitlement to the contiguous zone, exclusive economic zone (EEZ) and continental shelf, China's entitlement to the special SCS area should include, all the existing and future rights necessary for the development of these SCS islands, and for the maintenance of the sovereign relations between China's mainland territory and its indispensable archipelagic waters.

Fourth, China's entitlement to the area enclosed by the U-shaped line in the SCS is recognized by the jurisprudence of international law and state practice. The Chinese people first discovered, named, developed and utilized the SCS, and have effectively managed them for a long term. These historical facts substantiate China's entitlement above. Additionally, China's entitlement is acknowledged by the post-World War II international legal system, including the 1943 Cairo Declaration, the 1945 Potsdam Declaration and the 1951 Treaty of San Francisco. These facts indicate that China's entitlement to the SCS islands is distinct from the entitlement of other mainland-based States to their islands.

Lastly, China's rights over the SCS do not prevent China from "shelving disputes and seeking joint development" with other States concerned. In fact, the Chinese people have engaged in all kinds of activities in the SCS for over 2,000 years. Before the late 1960s, when abundant hydrocarbon resources were found in the SCS area, the fact that the SCS islands belong to China was widely recognized by the international community, and confirmed by diplomatic practice, along with authoritative maps and publications of other States. However, after the late 1960s, the Philippines and other States, one after another, illegally occupied and encroached upon more than 40 islands or features of Nansha Islands. China not only showed great tolerance and exercised much restraint towards such acts, but also put forward the initiative to "shelve dispute and seek joint development". Apart from concluding bilateral agreements with each administration of the Philippines to

settle their disputes over the SCS through negotiations, China also issued, together with the ASEAN countries, the Declaration on the Conduct of Parties in the South China Sea, and actively negotiate with the States concerned to formulate the Code of Conduct in the South China Sea, with an aim to maintain the peace and stability of the SCS region by taking practical actions.

### *B. The Legal Status of the Airspace over the SCS*

As stated above, the rights China enjoys over the area enclosed by the U-shaped line in the SCS should include, all the existing and future rights necessary for the development of the SCS islands, and for the maintenance of the sovereign relations between China's mainland territory and its indispensable archipelagic waters. "All future rights" is used here because China's rights over the area enclosed by the U-shaped line would not remain unchanged, and we should see these rights with foresight. Previously, the administration and economic development of islands were chiefly carried out through ships, but with the development of new technology, such jobs can also be performed through aircraft, network and communication equipment, and etc.

On 6 January 2016, two civilian airplanes requisitioned by Chinese government took off from Haikou Meilan International Airport, and successfully landed at 10:21 a.m. and 10:46 a.m., respectively, on the airfield newly built on the Fiery Cross Reef after nearly 2 hours' flight. These two planes returned to Haikou, China, in the afternoon of the same day, signifying that the test flight is successful. In addition, on 13 July of the same year, a flight took off from Haikou Meilan International Airport at 8:30 a.m. and landed on the newly built airfield on the Meiji Reef two hours later, while another took off from Haikou at 8:40 a.m. and landed on the airfield on the Zhubi Reef at 10:28 a.m.. The two civilian planes, one chartered by China Southern Airlines and the other by Hainan Airlines, both returned to Haikou after a short stay on the reefs. This successful test flight demonstrates that both airfields have the capability to ensure the safe operation of large civilian aircraft, which, in turn, would provide a convenient means of transportation for the provision of daily supplies to the SCS islands, as well as the relevant passenger traffic and medical aid. Furthermore, these airfields may serve as alternate airports in the SCS for cross-ocean flights, and are also in the position to offer cheaper and more flexible air routes options. Such flights fully reflect that China has employed a new vehicle to manage and develop the SCS islands.

Similar to China's rights over the relevant sea areas of SCS, its rights to the SCS airspace should include all the existing and future rights necessary for the development of the SCS islands, and for the maintenance of the sovereign relations between China's mainland territory and its indispensable archipelagic waters. According to Article 3 of the Declaration on the Conduct of Parties in the South China Sea, "[t]he Parties reaffirm their respect for and commitment to the freedom of navigation in and overflight above the South China Sea as provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea." Notably, such freedom of navigation and overflight should not be with prejudice to all the existing and future rights of China as described above.

Therefore, the rights China enjoys over the SCS airspace have the priority over the freedom of navigation or overflight, which is closely related to the principle of state sovereignty. The Charter of the United Nations (hereinafter "UN Charter") laid particular stress on state sovereignty. The SCS region, which serves as the important base supporting China's management and development of the Dongsha, Zhongsha, Xisha and Nansha Islands as well as their adjacent waters, has sovereign relations with China's mainland. Moreover, such sovereign relations have been exhibited in a continuous and consistent way. That is to say, the method that China adopted to manage and develop these SCS islands is a customary way recognized by the modern international law. Consequently, "the freedom of navigation in and overflight above the South China Sea" should not affect the exercise of China's rights abovementioned.

### **III. The Differences between State and Civil Aviation Behaviors**

#### *A. The Features of State Aviation Behavior*

In accordance with UNCLOS Articles 38, 53, 58 and 87, ships have, to varying extent, freedom of navigation in the straits used for international navigation, archipelagic waters of archipelagic States, EEZs and the high seas, while aircraft have varying degree of freedom of overflight over such sea areas. Coastal States generally adopt the transit passage regime for vessels going through the straits used for international navigation, but also the innocent passage regime in exceptional cases. Article 4 of the 1963 Convention on Offences and Certain Other Acts



Committed on Board Aircraft stipulates that a coastal State could interfere with an aircraft in flight over the high seas in order to exercise its criminal jurisdiction over an offence committed on board in exceptional cases. According to international customs and usage, coastal States have universal jurisdiction over international crimes committed on the high seas, such as piracy, slave trafficking and hijack.

However, the author contends, the operation of aircraft in the SCS airspace, should be subject to all the existing and future rights enjoyable by China, as necessary for the maintenance of the sovereign relations between China's mainland territory and its indispensable archipelagic waters, and for the development of its SCS islands. Therefore, the existing regimes cannot apply to the SCS airspace. That is to say, a regime should be specially designed for the SCS airspace, by utilizing and developing international law.

The creation of such a regime requires us to classify and identify the aircraft over the SCS. Both the Chicago Convention and the Civil Aviation Law of the People's Republic of China have differentiated state aircraft from civil aircraft, but failed to distinguish state from civil aviation behaviors.

Having the feature of quick movement and covering extensive areas, aviation behaviors are quite likely to get involved in sovereignty disputes. In that case, aviation behaviors, civil or state, should show enough concerns over any act that may be mistaken as any act of aggression, in order to avoid aircraft being shot down by mistake.

### **1. The Debate over the Status of Airspace**

The debate over the status of airspace started from the 1912 Annual Conference of the International Law Association held in Brussels. Two opposing opinions appeared in this conference: one holds that every State enjoys the freedom to fly in the airspace of other States, and the other asserts that every State has sovereignty over the airspace above its territory.

The first assertion that every State enjoys the freedom to fly in the airspace of

other States,<sup>9</sup> is represented by the International Air Services Transit Agreement and the International Air Transport Agreement. In practice, such freedom of overflight contradicts with the principle of state territorial sovereignty, since state sovereignty also extends to the territorial airspace. In particular, in terms of its natural attribute, territorial airspace covers territory and territorial sea; therefore, if foreign aircraft are allowed to fly freely in the airspace of a State, that State would be exposed to risks beyond calculation.

The Chicago Convention, a representative international treaty holding every State has sovereignty over the airspace above its territory, provides explicitly in its Article 1 that “[t]he contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.”

## **2. The Particularity of State Aviation Behavior**

Considering the attributes of civil aviation, and the illegal downing of civil aircraft appeared in history, to avoid using force against civil aviation behaviors has gradually become a global concern. However, such incidents had not been anticipated at the time when the Chicago Convention was prepared. Therefore, people often quoted Article 2(4) of UN Charter, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity

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9 Article 1(1) of the International Air Services Transit Agreement provides that: “Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services: 1. The privilege to fly across its territory without landing; 2. The privilege to land for non-traffic purposes. The privileges of this section shall not be applicable with respect to airports utilized for military purposes to the exclusion of any scheduled international air services. In areas of active hostilities or of military occupation, and in time of war along the supply routes leading to such areas, the exercise of such privileges shall be subject to the approval of the competent military authorities.” Additionally, Article 1(1) of the International Air Transport Agreement stipulates that: “Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services: 1. The privilege to fly across its territory without landing; 2. The privilege to land for non-traffic purposes; 3. The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses; 4. The privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses; 5. The privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory. With respect to the privileges specified under paragraphs 3, 4 and 5 of this section, the undertaking of each contracting State relates only to through services on a route constituting a reasonably direct line out from and back to the homeland of the State whose nationality the aircraft possesses. The privileges of this section shall not be applicable with respect to airports utilized for military purposes to the exclusion of any scheduled international air services. In areas of active hostilities or of military occupation, and in time of war along the supply routes leading to such areas, the exercise of such privileges shall be subject to the approval of the competent military authorities.”

or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” After the crash of Korean Air Lines Flight 007 in 1983, the ICAO adopted a resolution on 6 March, 1984, based on its investigation, saying that any use of weapon against civil aircraft was incompatible with the rules of international law, no matter what reasons caused the airplane to deviate from its scheduled route. However, the resolution failed to specify which rule of international law was violated. In May of the same year, Article 3 *bis* was added to the Chicago Convention, which provided that every State must refrain from the use of weapons against civil aircraft in flight.

However, State aviation behavior is different from civil one in the following aspects:

First, the subject of state aviation behavior is State, while the subject of civil aviation behavior is individuals or any other entities. Notably, the concept of “State” here mainly refers to state power, which is not a civil subject. In that case, the operation of state-owned airlines should be differentiated from state operation. The “state” in the expression of “state-owned airlines” is used in the sense of civil subject. That is to say, state, as a civil subject, conducts civil act. It follows that the operation of state-owned airlines is civil aviation behavior.

Second, state aviation behavior is of the nature of state mission, which reflects the administrative power of a State. Hence, in case of conflicts with the sovereignty of other States, state aviation behavior is much more complex than civil aviation activities. Sovereignty means the supreme power internally, the right to independence externally, and the right of self-defence to prevent foreign invasion. Therefore, state aviation behavior reflects sovereignty in whole or in part, which shows a kind of power. It should refrain from jeopardizing the sovereignty of other sovereign States. In contrast, civil aviation behavior is a kind of civil acts by civil subjects with equal status, which manifests the “rights” of such subjects.

Third, all the principal international aviation conventions contain provisions defining whether they are applicable to state aviation behaviors, and also roughly distinguish their application in different areas. Comparatively, international regulations contain detailed provisions on civil aviation behaviors, but almost without any provisions on state aviation behaviors.

Name of Convention	Applicability to civil aviation behavior	Applicability to state aviation behavior	Legal basis
Convention for the Unification of Certain Rules Relating to International Carriage by Air (hereinafter “Warsaw Convention”)	Applicable	Applicable to state aviation behavior, depending on the reservation made by a contracting State	<p>Article 1(1) of Warsaw Convention provides, “This Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking”, which indicates that this convention is applicable to civil aviation behaviors.</p> <p>Notably, Article 2(1) of the convention stipulates, “This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.” This provision shows that Warsaw Convention applies to carriage by air performed by the State. However, the convention states in its Additional Protocol, “The High Contracting Parties reserve to themselves the right to declare at the time of ratification or of accession that the first paragraph of Article 2 of this Convention shall not apply to international carriage by air performed directly by the State, its colonies, protectorates or mandated territories or by any other territory under its sovereignty, suzerainty or authority”. Therefore, whether the Warsaw Convention applies to state aviation behavior is still dependent upon the reservation made by the contracting States.</p>

Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (hereinafter "Hague Protocol")	Applicable	Applicable to state aviation behavior, depending on the notification made by a contracting State	Article 26 of Hague Protocol provides, "No reservation may be made to this Protocol except that a State may at any time declare by a notification addressed to the Government of the People's Republic of Poland that the Convention as amended by this Protocol shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities." That is to say, Hague Protocol applies to civil aviation behaviors, and to state aviation behaviors depending on the notification made by a contracting State.
Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier (hereinafter "Guadalajara Convention")	Applicable	Applicable to state aviation behavior, depending on the reservation and notification made by a contracting State	The Guadalajara Convention, which sets out rules for some specific issues, basically follows the rules under the Warsaw Convention concerning its applicability to state and civil aviation behaviors.

<p>Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, as Amended by the Protocol Done at the Hague on 28 September 1955 (hereinafter “Guatemala City Protocol”)</p>	<p>Applicable</p>	<p>Applicable to state aviation behavior, depending on the reservation and notification made by a contracting State</p>	<p>Article 23 of the Guatemala City Protocol prescribes, “a State may at any time declare by a notification addressed to the International Civil Aviation Organization that the Warsaw Convention as amended at The Hague 1955, and at Guatemala City, 1971 shall not apply to the carriage of persons, baggage and cargo for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities.” It means that Guatemala City Protocol applies to civil aviation behaviors, and to state aviation behaviors depending on the reservation and notification made by a contracting State.</p>
<p>Convention for the Unification of Certain Rules for International Carriage by Air (hereinafter “Montreal Convention”)</p>	<p>Applicable</p>	<p>Inapplicable to international aviation activities carried out for military, customs or police purposes</p>	<p>The Montreal Convention aims to ensure the protection of the interests of consumers in international carriage by air, and establish a equitable compensation system based on the principle of restitution, in case of death or injury of passengers, damage to baggage, or damage to cargo during international carriage by air. According to the aim of the convention, this convention solely applies to civil aviation behaviors.</p>
<p>Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft</p>	<p>Partly Applicable</p>	<p>Partly Applicable</p>	<p>Article 3 of the Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft provides, “(1) The following aircraft shall be exempt from precautionary attachment: (a) Aircraft assigned exclusively to a Government service, the postal service included, commerce excepted; (b) Aircraft actually put in service on a regular line of public transportation and indispensable reserve aircraft; (c) Any other aircraft assigned to transportation of persons or property for hire, when it is ready to depart for such transportation, except in a case involving a debt</p>

			contracted for the trip which it is about to make or a claim arising in the course of the trip. (2) The provisions of the present Article shall not apply to a precautionary attachment made by the owner of an aircraft who has been dispossessed of the same by an unlawful act.” Therefore, this convention partly applies to civil aviation behaviors, and also partly applies to state aviation behaviors.
Convention on the International Recognition of Rights in Aircraft	Applicable	Inapplicable to international aviation activities carried out for military, customs or police purposes	Article 13 of the Convention on the International Recognition of Rights in Aircraft provides, “This Convention shall not apply to aircraft used in military, customs or police services.” Therefore, this convention applies to civil aviation behaviors, but not international aviation activities carried out for military, customs or police purposes.
International Convention for the Unification of Certain Rules Relating to Damage Caused by Aircraft to Third Parties on the Surface (hereinafter “Rome Convention”)	Applicable	Unclear	In accordance with Article 21 of the 1933 Rome Convention, this Convention applies to other aircraft. However, the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface concluded on October 7, 1952, commonly called the Rome Convention of 1952, failed to clearly define the scope of other aircraft.
Convention on Offences and Certain Other Acts Committed on Board Aircraft (hereinafter “Tokyo Convention”)	Applicable	Inapplicable to international aviation activities carried out for military, customs or police purposes	Article 1(4) of the Tokyo Convention states, “This Convention shall not apply to aircraft used in military, customs or police services.” That is to say, this convention applies to civil aviation behaviors, but not international aviation activities carried out for military, customs or police purposes.

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation	Applicable	Inapplicable to international aviation activities carried out for military, customs or police purposes	Pursuant to Article 4(1) of the convention, this Convention applies to civil aircraft, but not to aircraft used in military, customs or police services.
Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (hereinafter “Beijing Convention”) and Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (hereinafter “Beijing Protocol”)	Applicable	Inapplicable to international aviation activities carried out for military, customs or police purposes	Article 5 of Beijing Convention provides that it applies to civil aviation behaviors, but not international aviation activities carried out for military, customs or police purposes.



The differences listed above show that state aircraft behaviors performed in foreign and international airspace need to be carefully studied. In practice, such behaviors have led to conflicts of powers, or sovereignty conflicts, which give rise to the question on how to determine an act of aggression. Given that the global anti-terrorism situation is still severe at present, the study on aggression should not only made from a conventional angle, but also take anti-terrorism factors into account.

## *B. The Source of the Definition for Act of Aggression*

### **1. Article 51 of the UN Charter**

Article 51 of the UN Charter provides,

*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.*

A State's right to self-defence when suffering an armed attack, which is granted to the State by this Article 51, originates from the principle of state sovereignty. The sovereignty of a State means that a State can independently deal with its domestic and foreign affairs, and has the supreme authority to administrate itself.

"Armed attack", the core concept in this article, is a factor that triggers the exercise of the right to self-defence.<sup>10</sup> However, the opinions of different States vary with respect to the requirements of "armed attack".

### **2. The Caroline Rule**

In 1837, the United Kingdom was facing a rebellion in Canada, which at that time was still under British control. A number of the rebel forces acting in

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10 Tarcisio Gazzimi, *The Changing Rules on the Use of Force in International Law*, Manchester: Manchester University Press, 2005, p. 132.

support of the Canadian rebellion (the majority of which being U.S. nationals) were stationed on Navy Island on the Canadian side of the Niagara River. They were supplied in munitions and personnel by the *Caroline*, which was an American steamer hired for that purpose. On December 29, while the *Caroline* was docked at Schlosser, in U.S. territory, it was attacked by British forces that set fire to the steamer and towed it over Niagara Falls. In the process, a U.S. citizen was killed. The U.S. protested against the British act. However, the U.K. alleged that its act was necessary for self-defense and self-preservation.<sup>11</sup> And the Caroline Rule was established in this case, which says that self-defence may be justified only in cases where the “necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation”.<sup>12</sup>

However, due to the traditions of case law, the facts of the *Caroline case* had overwhelming influence on the interpretation of conclusions, which highlighted the element of “preemptive self-defense” in the case.

### **3. Article 9 of Chicago Convention and the “No-Fly Zones” Imposed by the UN Security Council**

Article 9 of Chicago Convention states,

#### *Prohibited areas*

*a) Each contracting State may, for reasons of military necessity or public safety, restrict or prohibit uniformly the aircraft of other States from flying over certain areas of its territory, provided that no distinction in this respect is made between the aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the aircraft of the other contracting States likewise engaged. Such prohibited areas shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation. Descriptions of such prohibited areas in the territory of a contracting State, as well as any subsequent alterations therein, shall be communicated as soon as possible to the other contracting States and to the International Civil Aviation Organization.*

*b) Each contracting State reserves also the right, in exceptional circum-*

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11 James A. Green, Docking the *Caroline*: Understanding the Relevance of the Formula in Temporary Customary International Law Concerning Self-Defense, *Cardozo Journal of International and Comparative Law*, Vol. 14, Issue 2, 2006, pp. 433–435.

12 R. Y. Jennings, The *Caroline* and *McLeod* Cases, *American Journal of International Law*, Vol. 32, Issue 1, 1938, pp. 91–92.

*tances or during a period of emergency, or in the interest of public safety, and with immediate effect, temporarily to restrict or prohibit flying over the whole or any part of its territory, on condition that such restriction or prohibition shall be applicable without distinction of nationality to aircraft of all other States.*

*c) Each contracting State, under such regulations as it may prescribe, may require any aircraft entering the areas contemplated in subparagraphs a) or b) above to effect a landing as soon as practicable thereafter at some designated airport within its territory.*

In conformity with Article 9 of the Chicago Convention, the Spanish Government, in 1967, declared the Spanish airspace surrounding Algeciras Bay a zone prohibited to aerial navigation. The U.K. protested against this declaration and forwarded its concerns over the issue to the ICAO Council. Nevertheless, since this issue was politicized, the deliberation of this issue was postponed indefinitely.

It should be noted, since the Chicago Convention does not apply to state aviation behaviors, it has little effect on state aviation behaviors if its Article 9 is invoked.

UN Security Council, by invoking the doctrine of humanitarian intervention, imposes limits on the airspace over the territory of a State. For example, UN Security Council imposed a “No-Fly Zone” over Libya in 2011, which has effect on state aviation behaviors.

### *C. The Requirements of an Armed Attack*

Both the Caroline Rule and Article 51 of the UN Charter consider “armed attack” as a condition that triggers the exercise of right to self-defence. However, neither of them articulate what types of actions constitute an “armed attack”.

#### **1. Restrictive Interpretation**

According to restrictive interpretation in the conventional sense, “if an armed attack occurs against a Member of the United Nations” under UN Charter Article 51 should be strictly, narrowly and precisely construed. Such an restrictive interpretation greatly limits a sovereign State’s right to defend itself, since a State can defend itself only when it suffers an armed attack. And this time frame does not

include the preparatory phase prior to an armed attack.<sup>13</sup> Moreover, some scholars even hold that an armed attack should actually take place and continue for a period of time.<sup>14</sup>

In addition, the restrictive interpretation of armed attack was also modified to some extent. It is asserted that if one of two neighboring States launches a rocket threatening the safety of its neighbor, then the right to self-defence can be invoked under Article 51 of the UN Charter.<sup>15</sup> It is also proposed that, apart from the conditions above, such an attack should also be “irreversible”.<sup>16</sup>

## 2. Extensive Interpretation

Restrictive interpretation is closely associated with the time dominated by land battles. However, with the development of military technology, warcraft, cruise missiles and other weapons of mass destruction become the main weapons used in wars, which poses challenges to the conventional way to determine an “armed attack”. For example, when a State has deployed its precision guided missiles, its neighboring States, if within the attack range of the missiles, would suffer devastating blows at any time.

In this new context, the extensive interpretation of an “armed attack” was formed. When attacked by high-tech weapons, the State attacked may not be able to effectively react to the attack, which would actually put the State in a passive position. Therefore, as one scholar proposed, if a State may only exercise the right to self-defence when a missile crosses its border, then the concept of effective self-defence would be meaningless.<sup>17</sup>

## 3. The Anti-Terrorism Factors in an Act of Aggression

During the 9/11 attacks, an American fighter attempted to intercept the fourth airplane seized by the terrorists. Unfortunately, this fighter crashed in the air over Pennsylvania before the interception. Immediately after the 9/11 attacks, U.S. President George W. Bush, Secretary of Defense Donald Henry Rumsfeld and the Joint Chiefs of Staff formulated a new code of conduct in case of similar

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13 Zhou Gengsheng, *International Law*, Beijing: The Commercial Press, p. 199. (in Chinese)

14 Xu Guangjian ed., *Commentary on the Charter of United Nations*, Taiyuan: Shanxi Education Press, 1999, pp. 353~360. (in Chinese)

15 Ian Brownlie, *International Law and the Use of Force by States*, Oxford: Clarendon Press, 1963, p. 367.

16 Singh M. Narendra, *The Right of Self-Defence in Relation to the Use of Nuclear Weapons*, *Indian Yearbook of International Affairs*, 1956, Vol. 5, pp. 25~26.

17 Ian Brownlie, *International Law and the Use of Force by States*, Oxford: Clarendon Press, 1963, pp. 366~369.

emergencies. Before the new code, the U.S. Department of Defense had not been officially approved to use force against any hijacked airplane.<sup>18</sup>

Article 7 (Suppressing Terrorist Acts in the Air) of the Russian Federal Law No. 35-FZ on Counteraction of Terrorism (2006) specifies,

*1. The Armed Forces of the Russian Federation shall use their weapons and military equipment in the procedure established by normative legal acts of the Russian Federation for the purpose of removing the threat of a terrorist act in the air or for the purpose of suppressing such terrorist act. 2. If an aircraft does not react to radio commands of ground control centers to stop violating the rules of using the airspace of the Russian Federation and (or) to radio commands and visual signals of the aircrafts of the Armed Forces of the Russian Federation sent to intercept it, or refuses to follow radio commands or visual signals not explaining the reasons for it, the Armed Forces of the Russian Federation shall use their weapons and military equipment for preventing the flight of the said aircraft by way of forcing it to land. If the aircraft does not obey the demand to land and there is a real danger of the loss of life or the onset of an ecological catastrophe, the weapons and military equipment shall be used for preventing the flight of the said aircraft by way of destroying it. 3. Where there is reliable information about the probable use of an aircraft for committing an act of terrorism or about the occupation of an aircraft and, with that, all measures required under the circumstances for its landing have been taken and there is a real danger of the loss of life or the onset of an ecological catastrophe, the Armed Forces of the Russian Federation shall use their weapons and military equipment for preventing the flight of the said aircraft by way of destroying it.*<sup>19</sup>

The government of Slovakia adopted a decree on 16 February 2005, authorizing its Defence Minister to order the downing of any aircraft violating its airspace, if necessary. In accordance with this decree, Slovakian air force is empowered to intercept any aircraft entering its airspace. In exceptional cases, where there are clear evidences indicating that the aircraft entering its airspace is

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18 U.S. Air Force Conducted Live-Fire Drills with Respect to Hijacked Airliners, at <http://mil.news.sina.com.cn/2003-10-05/153963.html>, 24 November 2016. (in Chinese)

19 Xu Guimin, A Review on the Features of Russian Legislation against Terrorism, *Global Law Review*, Vol. 35, No. 1, 2013, p. 57. (in Chinese)

employed by terrorists to launch attacks, which may cause severe damages to life or property, the Slovakian Defence Minister has the right to order the downing of such aircraft, be it civil or military.<sup>20</sup>

In the current situation of global anti-terrorism, prior assertions that terrorist acts constituted an “armed attack” have met great challenges.<sup>21</sup> Such assertions are regarded as a strange formalism in modern day,<sup>22</sup> which therefore need to be evolved. Particularly, the UN Security Council, in its Resolution 1368, did not connect the exercise of the right to self-defence with armed attacks launched by States, but expressly pointed out the notion of “terrorist attacks”. Additionally, neither UN Security Council in its Resolution 1373, nor the International Court of Justice in *Oil Platforms (Iran v. USA)*, correlated armed attacks with state behaviors.

Due to the increasing of global anti-terrorist actions and regional conflicts and confrontations, the security of civil aircraft, when flying over the conflict areas, became a global concern. In 2014, ICAO set up the Task Force on Risks to Civil Aviation Arising from Conflict Zones, which convened four meetings consecutively. The meetings studied the safety and security crises facing civil aviation arising from conflict zones.<sup>23</sup>

Against the backdrop of international anti-terrorism, States are inclined to, when assessing whether a particular action can constitute an act of aviation aggression, focus on the aviation behavior *per se*, instead of judging whether it is performed by a State or not. That is to say, the corresponding rules of international law have been less invoked against the background of anti-terrorism.

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20 European States Pass Laws Authorizing Shooting Down of Hijacked Aircraft in Order to Avoid the Replaying of 9/11 Tragedy, at <http://news.tom.com/1003/3295/2005114-1761852.html>, 24 November 2016. (in Chinese)

21 Sean D. Murphy, Terrorism and the Concept of Armed Attack in Article 51 of the UN Charter, *Harvard International Law Journal*, Vol. 43, No. 1, 2002, pp. 45~46.

22 Christopher Greenwood, International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq, *San Diego International Law Journal*, Vol. 4, 2003, pp. 16~17.

23 The author attended the fourth meeting of the special group held by the ICAO from 13 to 15 July 2015, in Montreal, Canada. The meeting reviewed the application of the Convention on International Civil Aviation and other civil aviation treaties relating to conflict zones. Delegates from 15 States, including China, the United States, Russia and Ukraine, attended the meeting. After discussion, the meeting ultimately adopted the Report on the Outcome of the Meeting of the Special Group to Review the Application of ICAO Treaties Relating to Conflict Zones, which would be forwarded to the ICAO Council.

## **IV. From State Aircraft to State Aviation Behaviors: An Review of Existing Theories**

As previously mentioned, we need to create a regime of state aviation behavior, which corresponds to the existing regime of state aircraft. The author attempts to start the discussion from the existing theories associated with state aircraft.

### *A. ICAO*

The ICAO was established with an aim<sup>24</sup> to promote the development of civil aeronautics and cooperation in this regard. However, the attainment of this aim is conditioned on differentiating civil from state aircraft. Notably, ICAO is unauthorized to define state aircraft. Nevertheless, the organization has made some researches on the differentiation between civil and state aircraft.

#### **1. A Special Study on the Distinction Between Civil and State Aircraft**

ICAO completed a study dedicated to the issue of civil/state aircraft,<sup>25</sup> and prepared a working report for it. This report, in fact, analyzed civil and state aviation behaviors. It asserted that aircraft other than those used in military, customs and police services should be regarded as civil aircraft. However, it also stressed that multiple factors should be taken into account, when examining the nature of an aircraft.

#### **2. Incidentally Mentioned in the Discussion of Aircraft Operation**

In the ICAO Civil/Military Cooperation Symposium held on April 14 and 15,

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24 The aims and objectives of ICAO include: to ensure the safe and orderly growth of international civil aviation throughout the world; to encourage the arts of aircraft design and operation for peaceful purposes; to encourage the development of airways, airports and air navigation facilities for international civil aviation; to meet the needs of the peoples of the world for safe, regular, efficient and economical air transport; to prevent economic waste caused by unreasonable competition; to ensure that the rights of Contracting States are fully respected and that every Contracting State has a fair opportunity to operate international airlines; to avoid discrimination between Contracting States; to promote safety of flight in international air navigation; and to promote generally the development of all aspects of international civil aeronautics.

25 Secretariat Study on "Civil/State Aircraft", C-WP/9835 of 22/09/1993, presented by the Secretary General at the ICAO Council 140th Session.

2015, when discussing about aircraft operation,<sup>26</sup> ICAO believed that the Chicago Convention should be applicable only to civil aircraft, and should not be applicable to state aircraft. Also, the ICAO contended that aircraft used in military, customs and police services should be state aircraft. In other words, state aircraft should include but not limited to aircraft used in military, customs and police services, meaning that state aircraft can be used for more purposes than military, customs and police services.

### **3. Incidentally Mentioned in the Discussion of Reduced Vertical Separation Minimum (RVSM)**

RVSM is implemented to reduce the vertical separation between flight level (FL) 290 and FL 410 from 2000-ft minimum to 1000-ft minimum, during the cruise phase of modern civil jet aircraft. It increases airspace capacity and operation profits of airlines, and decreases the workload in air traffic control. And ICAO started to study the RVSM standard in the 1970s.

In January 2002, upon negotiations between the aviation authorities of the States concerned and the relevant international civil aviation organizations, and after 13 working meetings, it is agreed that RVSM would be implemented in the airspace over the SCS since 21 February 2002. Aircraft without RVSM approval should not fly over RVSM airspace, and must fly below FL 290.

When deliberating the issue of RVSM,<sup>27</sup> ICAO mentioned incidentally to define state aircraft as aircraft used in military, customs and police services.

### **4. Incidentally Mentioned in the Discussion of Foreign Air Operator Validation and Surveillance**

When reviewing issues relating to foreign air operator validation and surveillance,<sup>28</sup> ICAO also explained Article 3 of Chicago Convention. The organization

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26 ICAO Global Provisions Regarding Aircraft Operations, ICAO Civil/Military Cooperation Symposium, Paris, France, 14-15 April 2015, at [http://www.icao.int/RO\\_EURNAT/Other%20Meetings%20Seminars%20and%20Workshops/ICAO%20Civil-Military%20Cooperation%20Meetings/ICAO%20Civil-military%20Cooperation%20Symposium%202015/ICMCS%20PPT12.pdf](http://www.icao.int/RO_EURNAT/Other%20Meetings%20Seminars%20and%20Workshops/ICAO%20Civil-Military%20Cooperation%20Meetings/ICAO%20Civil-military%20Cooperation%20Symposium%202015/ICMCS%20PPT12.pdf), 24 November 2016.

27 George Firican, State Aircraft in RVSM Airspace, ICAO Civil/Military Coordination Workshop, Kiev Ukraine, 28-31 October 2013, at [http://www.icao.int/RO\\_EURNAT/Other%20Meetings%20Seminars%20and%20Workshops/ICAO%20Civil-Military%20Cooperation%20Meetings/ICAO%20Civil-military%20Cooperation%20Seminar%202013/Kiev%20day%201%20George%20Firican%20State%20Aircraft%20in%20RVSM%20airspace.pdf](http://www.icao.int/RO_EURNAT/Other%20Meetings%20Seminars%20and%20Workshops/ICAO%20Civil-Military%20Cooperation%20Meetings/ICAO%20Civil-military%20Cooperation%20Seminar%202013/Kiev%20day%201%20George%20Firican%20State%20Aircraft%20in%20RVSM%20airspace.pdf), 24 November 2016.

28 Foreign Air Operator Validation & Surveillance Course, p. 7, at [http://www.icao.int/safety/implementation/library/a\\_icao\\_convention\\_annexes\\_related\\_to\\_fao\\_2009\\_07\\_r1.pdf](http://www.icao.int/safety/implementation/library/a_icao_convention_annexes_related_to_fao_2009_07_r1.pdf), 24 November 2016.



argued that this convention should be applicable only to civil aircraft, but not applicable to state aircraft, and aircraft used in military, customs and police services should be deemed as state aircraft, rather than civil aircraft. This argument is consistent with the one raised by the ICAO when discussing aircraft operation.

### *B. International Air Transport Association (IATA)*

IATA put forward, in the ICAO Civil/Military Cooperation Symposium held on 14-15 April 2015, that Chicago Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.<sup>29</sup> The view of the IATA was identical with that of ICAO, which also attended the symposium, reflecting the common view shared by these two important organizations in this regard.

### *C. European Aviation Safety Agency*

European Aviation Safety Agency, in its Guidance Material for the Certification and Operation of State Aircraft in European RVSM Airspace,<sup>30</sup> said that “only” aircraft used in the military, customs and police services would qualify as State aircraft. Comparatively, neither Chicago Convention nor ICAO has used “only” to strictly define the concept of state aircraft.

### *D. North Atlantic Treaty Organization (NATO)*

When discussing issues related to civil/military aircraft operating in support of NATO-led missions and operations,<sup>31</sup> NATO argued that aircraft used in the military, customs and police services should be state aircraft, rather than civil

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29 Dmitry Kosolapov, Improve Safety for Flight over the High Seas, ICAO Civil/Military Cooperation Symposium, Paris, France, 14-15 April 2015, p. 4, at [http://www.icao.int/RO\\_EURNAT/Other%20Meetings%20Seminars%20and%20Workshops/ICAO%20Civil-Military%20Cooperation%20Meetings/ICAO%20Civil-military%20Cooperation%20Symposium%202015/ICMCS%20PPT07.pdf](http://www.icao.int/RO_EURNAT/Other%20Meetings%20Seminars%20and%20Workshops/ICAO%20Civil-Military%20Cooperation%20Meetings/ICAO%20Civil-military%20Cooperation%20Symposium%202015/ICMCS%20PPT07.pdf), 24 November 2016.

30 EUROCONTROL, Guidance Material for the Certification and Operation of State Aircraft in European RVSM Airspace, at <https://www.eurocontrol.int/sites/default/files/article/content/documents/official-documents/guidance/2012-cmac-rma-military-guidance.pdf>, 24 November 2016.

31 NATO Policy for Civil/Military Aircraft Operating in Support of NATO or NATO-led Missions and Operations, at [http://www.nato.int/nato\\_static\\_fl2014/assets/pdf/pdf\\_2016\\_08/20160804\\_1608-NATO-Policy-civil-military-aircraft.pdf](http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2016_08/20160804_1608-NATO-Policy-civil-military-aircraft.pdf), 24 November 2016.

aircraft. NATO is consistent with both ICAO and IATA in this aspect. Furthermore, NATO also emphasized that when any contracting States issues other guidelines for state aircraft, due regard should be paid to the safety of civil aircraft.

### *E. U.S. Air Force*

In the ICAO's RVSM Seminars for CAR/SAM Region, U.S. Air Force specifically talked about state aircraft issues. And it proposed that aircraft used in the military, customs and police services should be state aircraft, rather than civil aircraft. In addition, States have the freedom to define state aircraft, and should take into account the owner, operator, passengers, cargos and other factors when defining.<sup>32</sup>

### *F. Discussions over the Distinction between Civil and State Aircraft in China*

#### **1. Academic Circles**

In China, only a few academic papers have explored the distinction between civil and state aircraft. And these papers focus on the study and identification of state aircraft,<sup>33</sup> which virtually discuss state aviation behaviors.

#### **2. Practitioner Circles**

In Chinese practitioner circles, the Civil Aircraft Maintenance Certification Regulations (CAAC Decree No. 31) of 1993, provided that "state aircraft refer to the aircraft used in the military, customs and police services". However, this decree was abolished and replaced by the 2001 Civil Aircraft Maintenance Organization Certification Regulations. Additionally, "state aircraft" was used solely as a notion without any precise textual meaning in the following rules or regulations: Rules on Air Traffic Control of China's Civil Aviation,<sup>34</sup> Civil Aviation Flight Dispatcher

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32 U.S. Air Force: State Aircraft Issues, ICAO's 1st RVSM Seminar for CAR/SAM Region, ICAO's 2nd RVSM Seminar for CAR/SAM Region, at [http://www.icao.int/RO\\_SAM/Documents/2003/RVSMII/P-Storm-State%20Aircraft-E.pdf#search=State%20Aircraft%20%20us%20Air%20force](http://www.icao.int/RO_SAM/Documents/2003/RVSMII/P-Storm-State%20Aircraft-E.pdf#search=State%20Aircraft%20%20us%20Air%20force), 17 December 2016.

33 Huang Lihua, Legal Problems about the State Aircrafts, *Modern Law Science*, No. 6, 2000, pp. 146~149 (in Chinese); Li Wenli, Position of State Aircraft in International Law, *Journal of Anhui Vocational College of Police Officers*, No. 3, 2003, pp. 26~27. (in Chinese)

34 Rules on Air Traffic Control of China's Civil Aviation (CAAC Order No. 86) was promulgated on 5 July 1999 and came into force on 5 January 2000.

License Management Rules,<sup>35</sup> A Guide to Flight Plan Application and Its Approval for Foreign Aircraft Interim Flight Operations during Olympic/Paralympic Games issued by CAAC,<sup>36</sup> and Rules of Certification of Civil Aviation Aircraft Pilot and Ground Instructor.<sup>37</sup> The CAAC Notice Concerning Issues Relating to the Carriage of Dangerous Goods Contained in Relief Supplies determined the nature of a single behavior, saying that “the carriage of relief supplies containing dangerous goods by chartering may be considered as carriage by state aircraft, and therefore not subject to Regulations CCAR-276. Nevertheless, the safe disposal of cargo shall be carried out pursuant to the requirements laid out in Article 2(2).”

The preceding provisions show that the complete scope of state aircraft has not been defined by the practitioners. Currently, it is only partially described.

### *G. Periodic Conclusion with Respect to the Differentiation between Aircraft and Aviation Behavior*

In the view of the author, the existing discussions on the distinction between civil and state aircraft have confused the nature of aircraft with that of aviation behavior. Therefore, the two concepts need to be clarified.

Presently, most States and international organizations tend to include “aviation behaviors” into the concept of aircraft, which, however, may cause misjudgment of the actual behaviors of aircraft. For example, many incidents, happened in the history of global civil aviation, were caused by misjudging the behaviors of civil aircraft.

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35 Civil Aviation Flight Dispatcher License Management Rules (CAAC Order No. 136) was promulgated on 16 December 2004 and came into force on 15 January 2005.

36 A Guide to Flight Plan Application and Its Approval for Foreign Aircraft Interim Flight Operations during Olympic/Paralympic Games, a telegraph issued by CAAC, was promulgated in February 2008 and came into force on 1 July 2008.

37 Rules of Certification of Civil Aviation Aircraft Pilot and Ground Instructor (CAAC Order No. 224) was promulgated on 10 July 2014 and came into force on 1 September 2014.

Time	Incident	Identification of the Shooter	Consequences	Nature
23 July 1954	Cathay Pacific Douglas DC-4 Shootdown	In the aftermath of the Korean War, particularly in the year of 1954, military confrontations between Chinese mainland and Taiwan, and those between China and the United States, were in progress. In this period, air conflicts in the vicinity of Hainan Island happened constantly, which made pilots highly tense. The aircraft shot down was a Douglas C-54 airliner, the military version of the Douglas DC-4 converted for civilian use. Therefore, the possibility is high for such a plane to get misjudged.	Douglas DC-4 was severely damaged and then ditched into the ocean, killing 10 of 19 passengers and crew on board.	A civil aviation behavior was misjudged as a hostile act.
27 July 1955	Shootdown of EI Al Flight 402	During the first segment, the EI Al Flight strayed into Bulgarian airspace and two Bulgarian MiG-15 jet fighters was deployed to intercept the plane. According the pilots of Bulgaria, after receiving warnings, the L-049 Constellation initially pretended to follow the instructions and deployed its landing gear, but then sharply retracted it and changed course to the border between Bulgaria and Greece.	All 58 people on board were killed.	A civil aviation behavior was misjudged as a hostile act.
11 September 1968	Crash of a Air France Airliner Probably Caused by a Missile Misfired in a Weapon Test	According to the official report, the probable cause was attributed to a fire in the cabin. However, in 2011, a former serviceman, alleged in a television interview that a missile, misfired by the French army during a weapon test, in fact caused the crash of Air France Flight 1611.	Killing all 95 on board, including a French general.	Remains unclear.

20 April 1978	Forced Downing of a Korean Air Lines Jet by Soviet Fighters	A Soviet pilot incorrectly identified the plane as a United States Air Force reconnaissance RC-135, because RC-135 and Boeing 707 used the same design and were similar in appearance. When approaching the Korean aircraft, the Soviet pilot found that the aircraft resembled a civil plane, and requested the ground control to further confirm the threat. Despite this, the commander of ground control ordered the pilot to take down the plane. The Soviet alleged, the Flight 902 repeatedly ignored commands to follow the Soviet forces, and began drifting toward Finland. However, according to Korea's account, the Soviet interceptor did not follow the ICAO regulations, and its plane was ready to follow the Soviet forces for landing. The Su-15 fired a pair of air to air missiles. The first missile flew past the target. The second one hit Flight 902. After the dissolution of the Soviet Union, Russia publicly acknowledged it had the flight data recorder of Korean Air Lines Flight 007 (KAL007), and then returned the recorder to South Korea in 1992. Subsequently in 1993, ICAO released its final report upon the completion of a new-round of independent investigations. Such investigations found that the flight's deviation into Soviet territorial airspace was probably caused by the aircraft's autopilot system operating in HDG mode, after the point that it should have been switched to the INS (inertial navigation system) mode. That is to say, from the time it took off from Anchorage to the time it was shot down, the autopilot remained in the HDG mode, due to the captain's failure to operate in accordance with the standard modes. The negligence of the KAL007 captain, along with wrong judgment made by the pilots of Soviet fighters, directly caused the tragedy.	The plane was forced to descend, killing two of 109 passengers and crew members on board.	A civil aviation behavior was misjudged as a hostile act.
Morning on 1 September 1983	Crash of Korean Air Lines Flight 007		Killing 269 people on board.	A civil aviation behavior was misjudged as a hostile act.

3 July 1988	The Downing of an Iran Civil Plane by U.S. Forces	This incident happened under the tense situation in the Persian Gulf, where the Iran-Iraq War had been waged for years. Prior to the incident, U.S. Navy guided missile frigate <i>USS Stark</i> , on 11 May 1987, was “mistakenly” struck by an Iraqi missile and was on the edge of sinking. Then on 3 July 1988, an Iranian civil aircraft operating over the Persian Gulf was shot down by the United States Navy guided missile cruiser <i>USS Vincennes</i> , which was participating in a military exercise in the Strait of Hormuz at that time. The aircraft was destroyed by SM-2MR surface-to-air missiles fired from <i>Vincennes</i> .	All 290 people on board died.	A civil aviation behavior was misjudged as a hostile act.
4 October 2001	The Downing of a Russian Commercial Airliner by a Ukrainian Missile	Ukrainian government admitted that the Russian Flight 1812 was hit by an S-200 missile during the Ukrainian air defence exercises.	Killing all 78 people on board.	Shot down mistakenly.
17 July 2014	Malaysia Airlines Flight MH17 Crash	Remains unclear.	Killing 298 passengers and crew on board.	Remains unclear.

Currently, some States have unreasonable views towards China's entitlement to the SCS region. Against this backdrop, it is likely that the aircraft behaviors in the SCS airspace would be misjudged, because solely judging from the nature of aircraft cannot determine the behavior of an aircraft. Therefore, we need to study aircraft and aviation behaviors, and differentiate one from another, especially state aviation behaviors.

### 1. The Nature of Aircraft

The nature of an aircraft is primarily determined on the basis of its original intended usage, but this usage does not prevent it from being used for other purposes in the future. And changes of aircraft nature really exist.<sup>38</sup> In other words, the nature of aircraft is objective and may be changed. In that case, it is unscientific to decide aircraft behaviors solely from the nature of aircraft. For example, with respect to a civil aircraft performing certain state mission, the conclusion regarding the nature of its behavior would be contrary to the truth, if merely judging from the nature of the aircraft.

### 2. Aviation Behaviors

With the development of unmanned aerial vehicles (UAV), stubbornly insisting on treating the nature of aircraft as a criterion has become meaningless, because the nature of aircraft, in fact, depends on its behavioral purposes. For instance, UAV can be used for express delivery, and also for the performance of military missions. The behaviors of UAV would be confused with each other, if UAV is treated in a uniform way as a key concept. The author argues, precisely because of the defects lying in the definition of the nature of aircraft, the nature of aviation activities becomes easier to be decided, which, specifically, should be decided by the actual

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38 Boeing Makes the History of Converting Civil Aircraft into Military Aircraft, *Beijing Daily*, 22 May 2007 (in Chinese). For example, Boeing 737-100 was originally developed as a short-range airliner with a capacity of 65-80 passengers. That is to say, Boeing 737-100 was civil aircraft in nature. However, the development history of Boeing products tells, Boeing has developed large jet airliners including series 707, 737, 747, 757, 767 and 777, and series 787 is also developed and under trial production. In order to meet military needs, Boeing also converted its airliners into military aircraft. For instance, Boeing 707-320B was later converted into an early warning aircraft, which made its maiden flight in 1972; in November 2006, South Korea ordered four Boeing E-737 early warning aircraft, enabling South Korea to surveil the whole Korean Peninsula and some airspace of its neighboring States; in 1977, Boeing 747 was modified to ferry space shuttles, which has been used as shuttle carrier aircraft until now; Boeing KC-767 is an aerial refuelling tanker developed from Boeing 767, which can refuel a Boeing B-52H (a along-range, heavy strategic bomber) up in the air; in 1993, Japan became the primary user of Boeing 767 early warning aircraft, and four such aircraft have been put into service by now.

purpose of such activities. For example, a civil plane, Boeing 737-100, which was chartered by a State to do rescue and relief work, should be considered as carrying out state activities. It follows that aviation activities reflect the subjective nature of aircraft.

### 3. From Aircraft to Aviation Behaviors

The statements above show, the nature of aircraft is not directly related to the nature of aviation activities. If aviation behaviors are classified merely based on the nature of aircraft, the actual purposes of aircraft would be ignored. However, such actual purposes, instead of the original intended usage of aircraft, should be the critical element distinguishing civil from state aviation behaviors. Currently, aircraft is defined in terms of the subjective criteria of aviation behaviors. In that case, the definition of state aircraft could be *mutatis mutandis* applied to the definition of state aviation behaviors.

## V. The Purposes of State Aviation Behaviors

As described above, the determination of the nature of aircraft cannot contribute to the settlement of problems happened in real life. Due to their behaviors, many civil aircraft were shot down as state aircraft. Such tragedies can serve as a perfect example in this case. Given that the definition made by the international community for civil aviation behavior is relatively precise and clear, the real problem that we have to tackle is how to determine or judge state aviation behaviors.

### A. The Right to Define State Aviation Behaviors

First, the UN Charter stipulates, in its Preamble, the determination “to reaffirm faith ... in the equal rights ... of nations large and small,” and in Article 1 the purpose “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.” Particularly, the Charter provides: “The Organization is based on the principle of the sovereign equality of all its Members” (Article 2, Paragraph 1); “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State” (Article 2, Paragraph 7); and “relationship among [Members of the United Nations] shall be based on respect for the principle of sovereign equality” (Article 78). The principle of sovereign



equality, a fundamental organization principle of the United Nations, is listed as the most important one.

Second, according to Article 3(d) of the Chicago Convention, “[t]he contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.” It shows, following the UN Charter, the Chicago Convention also provides for the respect to the sovereignty of all States, and acknowledges that a State has the freedom to define its state aircraft or state aviation behavior.

Hence, both the principle of state sovereignty provided for in the UN Charter, and the freedom of States to define state aircraft or state aviation behavior contemplated in the Chicago Convention tell that, to provide for the definition and scope of state aircraft and state aviation behavior is a matter within a State’s sovereignty. Particularly, China should define state aviation behaviors, since the SCS region is the base supporting all the existing and future rights necessary for the maintenance of the sovereign relations between China’s mainland territory and its indispensable archipelagic waters, and for the development of the SCS islands.

### *B. The Differentiation Between Civil and State Aviation Behaviors*

Article 3 of the Chicago Convention provides,

#### *Civil and state aircraft*

*a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.*

*b) Aircraft used in military, customs and police services shall be deemed to be state aircraft.*

*c) No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.*

*d) The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.*

This article is considered as the one that has differentiated civil from state aircraft.

First, the Preamble of Chicago Convention expressively provides, “... in order

that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically. Have accordingly conclude this Convention to that end.” And Article 3 reaffirms, “This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.” These provisions indicate that the definition and scope of state aviation behavior are not covered in the Chicago Convention. Therefore, the definition of state aircraft contained in this convention is meaningful and applicable only in cases of civil aviation behaviors. In other words, the distinction between civil and state aviation behaviors as envisioned in the Chicago Convention is made in relation to the purpose of this convention, which hence is not applicable in all cases.

Second, semantically, the provision “[a]ircraft used in military, customs and police services shall be deemed to be state aircraft” (Chicago Convention, Article 3) uses the sentence pattern of “... used in (purposes), should be (nature).” In that case, defining state aircraft is, actually, a process of depicting the nature of aircraft based on the nature of aviation behaviors.

Third, Chicago Convention, Article 3, “aircraft used in military, customs and police services”, sets out its provision by enumerating all possible kinds of state aircraft. However, if we say the three kinds of aircraft listed above cover all state aircraft or all purposes of state aviation behaviors, the principle of state sovereignty under the UN Charter would be violated. Since all States enjoy equal sovereignty, and the purposes of state aviation behaviors are covered in state sovereignty, such purposes should not be subject to the definition contained in Article 3 of the Chicago Convention.

Lastly, Chicago Convention, Article 3(d) states, “The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.” This article shows this convention respects state sovereignty, and all States have the freedom to prescribe what state aircraft or state aviation behaviors are in their own States.

### *C. Civil Aviation Behaviors Defined in the Civil Aviation Law of the People’s Republic of China*

The Civil Aviation Law of the People’s Republic of China fails to directly define the term “state aircraft”. It only stipulates in Article 5, “Civil aircraft as referred to in this Law means aircraft other than those used in flight missions of

military, customs and police services”. However, the aim of this law is solely “to safeguard the national sovereignty of territorial airspace and the rights of civil aviation, to ensure the conduct of civil aviation activities in a safe and orderly manner, to protect the lawful rights and interests of the parties concerned in civil aviation activities, and to promote the development of civil aviation industry.” Therefore, Article 5, which is stated by enumeration, cannot be considered as a provision distinguishing civil aviation behavior from state aviation activities. This article may only be said to constitute a part of the definition of civil aircraft or civil aviation behavior. And the term of “civil aviation behavior” should be adequately defined by referring to the whole text and structure of the Civil Aviation Law of China and other laws or regulations.

In addition, Article 5 of the Civil Aviation Law of China, which was promulgated on 30 October 1995, to some extent, repeats the wording of the Chicago Convention Article 3, “Aircraft used in military, customs and police services shall be deemed to be state aircraft”. Consequently, this Article 5 does not have the full authority to differentiate state from civil aviation behaviors.

#### *D. State Aviation Behaviors Defined in the Constitution and Property Law of the People’s Republic of China*

The definition of state aviation behaviors should also be found in the Constitution and Property Law of the People’s Republic of China. Article 13 of the Constitution of China lays down some provisions about private property, saying: “The State may, in the public interest and in accordance with law, expropriate or requisition private property for its use and make compensation for the private property expropriated or requisitioned.” Furthermore, Article 44 of the Property Law of China prescribes, “In order to meet such urgent needs as rushing to rescue or providing disaster relief, the immovables or movables of any entities or individuals may be requisitioned within the limits of power and in compliance with the statutory procedures. After the emergent use, the requisitioned immovables or movables shall be returned to the owners. Where the immovables or movables of any entities or individuals are requisitioned, or if they are damaged or lost thereafter, compensations shall be made therefor.”

That is to say, “in the public interest” or “in order to meet such urgent needs as rushing to rescue or providing disaster relief”, the State may expropriate or requisition private property for its use. In a similar vein, “in the public interest”

or “in order to meet such urgent needs as rushing to rescue or providing disaster relief”, the State may expropriate or requisition civil aircraft for its use, which in fact turns a civil aviation behavior into a state aviation behavior.

### *E. Joint Determination*

The analysis above shows that making regulations on the definition of state aviation behavior is a matter within the sovereignty of a State, and a sovereign State has indisputable power in this regard. If dichotomy (state and civil aviation behaviors) is used to define aviation activities, the purposes of state aviation behaviors involve, at least, the following three aspects:

First, Article 5 of the Civil Aviation Law of China, “Civil aircraft as referred to in this Law means aircraft other than those used in flight missions of military, customs and police services”, defines civil aircraft by excluding all possible options, and at the meantime describes the purposes of non-civil aviation activities. Seen from the dichotomy of state and civil aviation behaviors, these purposes of non-civil aviation activities form a part of the purposes of state aviation behaviors. In the eye of positive law, to engage in “flight missions of military, customs and police services” is one of the purposes of state aviation behaviors.

Second, pursuant to the Constitution and the Property Law of China, “in the public interest” or “in order to meet such urgent needs as rushing to rescue or providing disaster relief”, the State may lawfully expropriate or requisition private property for its use. In real life, due to emergent disasters, the State would requisition civil aircraft to engage in some relief work, where civil aircraft activities have the nature of state aviation behaviors. In other words, according to the Constitution and the Property Law of China, performing state missions should become one of the purposes of state aviation behaviors.

Lastly, in accordance with the principle of state sovereignty under the UN Charter, and the provision that States may define their own state aircraft or state aviation behaviors under the Chicago Convention, States have the freedom to supplement the definition of state aviation behaviors.

To sum up, the purposes of state aviation behaviors include: to engage in “flight missions of military, customs and police services”, to meet “the public interest” and “to meet such urgent needs as rushing to rescue or providing disaster relief”. Additionally, States have the freedom to supplement the definition of state aviation behaviors.

### *F. Nature of Aviation Activities When State and Civil Aviation Behaviors Are Combined*

Where state and civil aviation behaviors are combined together, how to determine the nature of such aviation activities? For example, when law enforcement officers of a State, in accordance with a bilateral judicial agreement, take a fleeing criminal suspect handed over by the law-enforcement authority of another State, back to his home State by civil aviation flight, state activities (sending a criminal suspect under escort) and civil activities (ordinary passengers taking a plane) are combined together. In this case, how to define the nature of the activity of this aircraft? The author holds that this question should be answered based on the following standards.

Firstly, in order to define the nature of such aviation activities, we may look into whether the aircraft is primarily used for conducting civil or state activities. In the example mentioned above, if the flight is mainly used for carrying passengers, and the escorting of criminal suspect does not substantially affect the functions of the aircraft, then the aviation activity should be deemed as a civil aviation behavior; in contrast, if the civil aircraft, as required by the escorting mission, adopts special flight timetable and other means to ensure its navigation safety, then this aviation activity should be deemed as a state aviation behavior. Notably, with respect to an aircraft flying in the territorial air space of a State, the nature of its aviation behaviors should be decided in accordance with the laws of that State, which is a kind of respect to the sovereignty of the State concerned. Specifically, when the state aircraft of State A operate in the airspace of that State or the airspace over the high seas, they should comply with the domestic law of State A and the rules of international law; when the state aircraft of State A enter into the territorial air space of State B, they should be regulated by the domestic law of State B.

Secondly, we may examine who *de facto* controls the aircraft. State aviation behaviors are not only reflected in their purposes, but also include some external behaviors. On the one hand, some civil aviation behaviors are mistaken as state ones due to certain external behaviors; most of the airliner shootdown incidents in history were caused by misunderstanding of external behaviors. On the other hand, there are cases where state aviation behaviors, because of external behaviors, are

mistaken as civil ones.<sup>39</sup>

Lastly, we can also determine the nature of an aviation behavior through aircraft marks. Civil aircraft markings, referring to aircraft number, tail number and registration number, is a significant symbol used to identify aircraft. Without such unique numbers, civil aircraft are not allowed to engage in any flight. The ICAO Council first adopted Annex 7 “Aircraft Nationality and Registration Marks” to the Chicago Convention on 8 February 1949. And the fourth amendment to Annex 7 was adopted on 30 July 1981. Contracting States are required to notify the ICAO of any differences between their national regulations and the standards contained in this Annex 7, and describe the differences in the appendices to Annex 7. Such standards actually set out some regulations on the identification of civil aviation behaviors both on national and international levels. Hence, in the international arena, we may determine the nature of an aviation behavior through relevant

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39 For example, Israeli air force carried out the “Operation Babylon” on 7 June 1981. It deployed 14 airplanes, launching a surprise strike against a nuclear reactor about 20 km southeast of the Iraqi capital Baghdad. Israel painted its attack squadron resembling the aircraft of Jordanian air force. When Saudi radar detected the Israeli aircraft and the controllers required the Israeli pilots to report their identities, the Israeli pilots replied in fluent Arabic: “We are Jordanian air force conducting routine trainings.” The controllers believed it to be true. When Jordan radar detected these aircraft, due to the density of the squadron, the image displayed on the radar screen was just a blurring dot, like a large transport aircraft. When enquired, the pilots answered in American English: “It is a civil plane”. The Israeli aircraft muddled through again.

markings, including nationality,<sup>40</sup> common<sup>41</sup> and registration marks.<sup>42</sup>

## VI. Conclusions

The 1976 Treaty of Amity and Cooperation in Southeast Asia and the 1982 UNCLOS established the preliminary mechanism to peacefully settle the disputes in Southeast Asia. Unfortunately, this mechanism has not substantially contributed to the resolution of SCS disputes. In this context, China and ASEAN countries signed in 2002 the Declaration on Conduct of Parties in the South China Sea, which is the first political document specially designed to settle SCS disputes.

As mentioned previously, in the current situation of global anti-terrorism, the notion of “aggression act” tends to expand its meaning, and impose new requirements on the identification of state aviation behaviors. The identification of state aviation behaviors, essentially, concerns the legality of state aircraft behaviors carried out in foreign and international airspace.

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40 Selection rule of nationality mark: the nationality mark shall be selected from the series of nationality symbols included in the radio call signs allocated to the State of Registry by the International Telecommunication Union. The nationality mark shall be notified to the International Civil Aviation Organization.

41 The third amendment to Annex 7 was adopted by the ICAO on 23 January 1969, and entered into force on 23 May of the same year. The amendment introduced expressions such as “Common Mark”, “Common Mark Registering Authority” and “International Operating Agency”. In accordance with Article 77 of the Convention on International Civil Aviation, aircraft not registered on a national basis can apply for common marks. The common mark shall be selected from the series of symbols included in the radio call signs allocated to the ICAO by the International Telecommunication Union. Assignment of the common mark to a common mark registering authority will be made by the International Civil Aviation Organization. For example, the ICAO Council decision of 1983 required: the aircraft jointly registered by the Arab Air Cargo (cooperative between Iraq & Jordan) must bear the common mark “4YB”; joint register shall be maintained by Jordan; and Jordan & Iraq shall be jointly & severally bound to assume the obligations & responsibilities which ICAO attaches.

42 Generally, “registration mark” shall be letters, numbers, or a combination of letters and numbers. The nationality mark shall precede the registration mark. When the first character of the registration mark is a letter, it shall be preceded by a hyphen. According to the Regulations of the People’s Republic of China on the Nationality Registration of Civil Aircraft, with respect to a civil aircraft having not obtained a civil aircraft nationality registration certificate, a provisional registration mark may be applied, when the aircraft is used in test flights, performance flights, orientation flights for export delivery (to be delivered in a foreign State), or in other circumstances considered necessary by the CAAC. Aircraft with provisional registration marks should not engage in passenger and cargo transportation, as well as other business operations.

*A. Adhering to the Five Principles of Peaceful Coexistence on the Whole*

The Five Principles of Peaceful Coexistence, as open and inclusive principles of international law, embody the values of sovereignty, justice, democracy and rule of law.<sup>43</sup> These principles were also incorporated in the relevant declarations, such as the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, adopted by the UN General Assembly at its 25th session in 1970, and the Declaration on the Establishment of a New International Economic Order, adopted at the sixth special session of UN General Assembly in 1974. Disputes and differences between countries should be resolved through dialogue, consultation and peaceful means. We should increase mutual trust, and settle disputes and promote security through dialogue. Willful threat or use of force are discouraged. Flexing military muscles only reveals the lack of moral ground or vision rather than reflecting one's strength. Security can be solid and enduring only if it is based on moral high ground and vision. Therefore, these five principles should be employed as a general standard to deal with state aircraft behaviors performed in foreign and international airspace.

The SCS airspace is a part of the important base supporting China's management and development of Dongsha, Zhongsha, Xisha and Nansha Islands as well as their adjacent waters. China's entitlement to the SCS airspace should include, all the existing and future rights necessary for the development of these SCS islands, and for the maintenance of the sovereign relations between China's mainland territory and its indispensable archipelagic waters. The freedom of navigation and overflight of other States should be without prejudice to China's exercise of such rights.

Overall, in order to use SCS airspace, China's rights mentioned above should first be respected. In addition, the airspace should be used for peaceful development and win-win cooperation.

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43 Carry Forward the Five Principles of Peaceful Coexistence to Build a Better World through Win-win Cooperation, Address by H.E. Mr. Xi Jinping, President of the People's Republic of China, at Meeting Marking the 60th Anniversary of the Initiation of the Five Principles of Peaceful Coexistence, at [http://www.fmprc.gov.cn/mfa\\_eng/wjdt\\_665385/zyjh\\_665391/t1170143.shtml](http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t1170143.shtml), 24 November 2016.



### *B. Double Standard to Define State Aviation Behaviors*

As stated above, given that States are authorized to define state aviation behavior, and international conventions are silent on the said behavior, currently, there is no concept of state aviation behavior widely acknowledged in the international community. This situation makes the concept extensible. In this connection, when assessing whether a behavior is a state aviation behavior or not, or excluding the application of civil aviation conventions, the domestic law of the State concerned and the international law should be considered together.

On the one hand, the right to evaluate and identify state aviation behaviors falls under the scope of sovereignty. In particular, with respect to foreign aircraft flying over the territorial airspace of a State, that sovereign State has indisputable power to assess their activities. On the other hand, when determining the nature of an aviation behavior, the existing rules of international law should be complied with first, but the regulations and practice of the States concerned should also be taken into account.

### *C. The Standard to Determine the Innocence of State Aviation Behaviors*

State aviation behaviors, if carried out in foreign and international airspace, may cause conflicts of sovereignty. However, if a state aviation behavior does not jeopardize the sovereignty of another State, this behavior should not be deemed as a wrongful act. For example, where a state aviation behavior is performed in foreign and international airspace for relief work, it cannot be considered as wrongful. This point is recognized by the international law, since the wrongfulness of internationally wrongful acts is precluded in a situation of distress, which has long been established as a rule of customary international law. The International Law Commission, established by the United Nations General Assembly, adopted the Draft Articles on Responsibility of States for Internationally Wrongful Acts at its fifty-third session in 2001. Article 24(1) of the Draft Articles provides that, "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care."

State aviation behaviors carried out in the SCS airspace should not undermine the sovereign relations between China's mainland territory and its SCS islands, or

the support offered by the waters enclosed by the U-shaped line to such relations. That is to say, in the SCS region, state aviation behaviors should be performed according to this supreme principle, which derives from the principle of state sovereignty under modern international law. When any State utilizes a region that another State relies on for existence, it should not infringe the sovereignty of that State.

#### *D. The Standard of Excluding Reasonable Doubts*

The standard of excluding reasonable doubts is a standard applied in criminal procedure law to judge whether a suspect is guilty or innocent. This standard can also be applied to judge whether a state aviation behavior performed in foreign and international airspace is wrongful or not. That is to say, in procedure, a State cannot decide the wrongfulness of such a state aviation behavior before excluding all reasonable doubts.

As previously mentioned, when the state aircraft of State A operate in the airspace of that State or the airspace over the high seas, they should comply with the domestic law of State A and the rules of international law; when the state aircraft of State A enter into the territorial air space of State B, they should be regulated by the domestic law of State B. Therefore, it is highly possible that the two States would have different or even conflicting regulations about the identification of aviation behaviors. Currently, it is unrealistic to find a uniform standard from international law in this regard. In this context, we need to collate the existing standards, especially those concerning “innocence”.

China, a State with preferential rights to the SCS airspace, has duties of prudence and care under procedural law. SCS serves as a vital transportation hub. Being aware of the significance of SCS region to all States, China actively proposes to shape a normative order in the region through the Declaration on the Conduct of Parties in the South China Sea, with an aim to increase the public benefits derived from the SCS region.

#### *E. The Principle of Not Resorting to Force First*

States have the right to self-defence in cases of aggression or terrorist attacks. Nonetheless, force cannot be used, unless state aircraft behaviors performed in foreign and international airspace are determined as acts of aggression. When

deciding whether an act constitutes an act of aggression or not, restrictive interpretation should be applied in principle, but extensive interpretation may also be used, if necessary, against the backdrop of anti-terrorism. The Declaration on the Conduct of Parties in the South China Sea emphasizes that “[t]he Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign States directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea.”

Therefore, if the state aviation behaviors of any other States performed in the SCS airspace prejudice the sovereign relations between China’s mainland territory and its SCS islands, it should be settled first through consultation and negotiations.

Translator: XIE Hongyue